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No. 2525

IN THE

# United States Circuit Court of Appeals

## For the Ninth Circuit

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PHOENIX SECURITIES COMPANY (a corporation),
*Plaintiff in Error,*

vs.

M. E. DITTMAR,
*Defendant in Error.*

# ANSWER TO PETITION FOR A REHEARING.

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The first contention of plaintiff in error, that a recovery may not be had by defendant in error, even though a count *in quantum meruit* is contained in the complaint where a purchase is not consummated upon the original terms of the employment, is not only not in accordance with the great weight of authority, but is not even sustained by the New York case principally relied upon by counsel. That case (*Sibbald v. The Bethlehem Iron Company,* 83 N. Y. 378, 390) merely decided the point that

> "If after a broker has been allowed a reasonable time within which to produce a buyer and effect a sale, he has failed to do so, and the seller in good faith and fairly has terminated

> the agency and sought other assistance by the aid of which a sale is consummated, it does not give the original broker a right to commissions, because the purchaser is one whom he introduced and the final sale is in some degree aided or helped forward by his previous unsuccessful efforts."

In that case the broker who was suing had had his employment terminated in good faith.

In the case at bar the authority of the defendant in error had not been revoked, and the option contract which he procured was still alive and in force at the time of its modification by the parties thereto.

The distinction between the case of *Sibbald v. Bethlehem Iron Company* and the case at bar is recognized in the subsequent New York cases, as in the case of

*Diamond v. Wheeler* (80 N. Y. Suppl. 416),

where the jury found that the employment of a broker had not been terminated; the case of

*Buehler v. Weiffenbach* (46 N. Y. Suppl. 861),

in which it was held that a broker was entitled to commission where, on behalf of a client, he made an offer for property which was rejected, and subsequently accepted when made through another broker; in the case of

*Levy v. Coogan* (9 N. Y. Suppl. 534),

holding that where plaintiff introduced purchasers to the defendants, and negotiations were carried on by defendants' agent resulting in an agreement

for a slightly smaller sum than that originally proposed, the plaintiff might recover.

The further contention of plaintiff in error that the defendant in error did not find a purchaser for the property since the purchaser went to him of his own volition is squarely contrary to the decision of the case of

*Lawler v. Armstrong* (102 Pac. 775),

cited by us in our former brief.

Counsel for plaintiff in error next contend that:

> "If the Court is right in sustaining the rulings of the trial Court respecting the admissibility of the evidence referred to, the judgment would have to be affirmed, even if a request for judgment had been made at the trial. The Court necessarily holds that the evidence was sufficient, otherwise the evidence respecting the value of the services would be immaterial and irrelevant" (page 7).

This by no means follows. Counsel loses sight of the difference between the admissibility of evidence and its cumulative effect upon the Court in enabling it to come to a decision upon the merits. The ruling of the Court that the evidence was *admissible* did not necessarily mean that the Court must find for the plaintiff. After reviewing all of the evidence along the line in question, the Court might, nevertheless, have found that its cumulative effect was not sufficient to permit of a recovery by the defendant in error.

The voluntary suggestion of counsel that the trial Court requested the parties to argue the case upon briefs, certainly cannot excuse the failure to comply with the rule prescribed by statute in order to enable this Court to review the errors complained of. Unquestionably if counsel had made the motion which the law requires him to have made, the Court would have ruled upon it one way or the other. If adversely to his contention, a subsequent examination of the briefs offered, might have induced the court to change its ruling.

The contention that the brief filed by plaintiff in error is necessarily a "request" for judgment, and that the order for judgment is a ruling, and that such order is deemed excepted to, has at least the merit of originality. We submit, however, that it will require more than the suggestion of counsel that the distinction made by the Court will promote "disrespect for the law", to induce the Court to ignore the plain requirements of the statute. The contention that the clear language of the statute in question (Rev. Stats., Sec. 700), that:

> "The *rulings* of the Court *in the progress of the trial* of the cause, *if excepted to at the time,* and duly presented by a bill of exceptions, may be reviewed",

permits of any other conclusion than that reached by the Court, is clearly and hopelessly untenable.

A final argument that the objection to the questions asked by defendant in error was based, not

upon the ground of variance, but upon the ground that "the evidence does not justify a recovery by the plaintiff, upon any theory", is likewise without foundation. This argument, as stated in the brief of plaintiff in error, is based upon the theory that "the facts proved did not warrant a recovery under any form of pleading whatever". This contention, as we have seen and as was pointed out by this Court in its decision, is clearly contrary to well-settled law.

Dated, San Francisco,
August 9, 1915.

Respectfully submitted,
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